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No.

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WAYNE ESTELLE, WARDEN

Petitioner,

v.

MARK OWEN McGUIRE

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the Ninth Circuit improperly expanded its habeas corpus jurisdiction and found a due process violation by interpreting state law and reversing an evidentiary ruling which the state courts held to be correct as a matter of state law.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, filed May 4, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 902 F.2d 749 (1990). A copy of the opinion is attached to this petition as Appendix A. An earlier opinion, reported at 873 F.2d 1323 (1989), was filed on May 8, 1989, and withdrawn on

April 23, 1990. A copy of that opinion is attached as Appendix B. The order of the District Court denying the petition for writ of habeas corpus was not reported. It appears at Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 4, 1990. Rehearing and rehearing en banc were denied, with two circuit judges dissenting, on November 23, 1990. That order, along with the dissenting opinion, is attached as Appendix D. This petition for writ of certiorari follows within 90 days. 28 U.S.C. § 2101(c); Supreme Court Rules 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 28, section 2254 provides in pertinent part: "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT

A. Factual Background

Respondent, Mark McGuire, was convicted in Alameda County Superior Court on one count of second degree murder, a violation of California Penal Code section 187. He was sentenced on May 12, 1982, to state prison for the statutory term of fifteen years to life.

Respondent and his wife, Daisy, brought Tori Aurora McGuire, their six-month old child, to the emergency room on July 7, 1981. She was bluish in color, not breathing, and had bruises on her body. Respondent told the emergency room nurse that Tori had recently had a cold and had hit her head that morning falling off a couch.

While the doctors were treating Tori, Daisy and respondent waited near the emergency room screening area. Daisy asked him what had happened. Respondent replied that he was upstairs and "guessed" that Tori had fallen off the couch. Daisy continued to ask what had really happened, but received the same answer. She reminded respondent that Tori was all right when Daisy left the house and insisted that he was responsible for the child's situation. This conversation was overheard by another woman in the waiting room who testified at the trial.

When Tori reached the emergency room she was lifeless. She had a large recent bruise on her upper left chest with multiple bruises around it. She also had marks on her ears and scar tissue indicative of a tearing wound

to the rectum. The child died about forty-five minutes after arriving at the hospital.

An autopsy revealed at least seventeen contusions on Tori's chest and twenty-nine more to her abdominal area. They were fresh and indicated a blow from a hand. A number of internal organs were lacerated or torn. Only the application of a great deal of blunt force could have caused the injuries. An x-ray examination revealed several partially healed rib fractures.

The emergency room physician who treated Tori and the pathologist both concluded that she was a battered child. They agreed a fall from a couch could have caused none of her injuries, even if she struck an object in the process.

The police investigated these unexplained injuries. During a brief interview at the hospital, respondent said that he put Tori on the couch and then went upstairs. He heard her crying and when he came back, found Tori lying on the floor. He thought that she might have fallen and struck the walker.

An officer later accompanied respondent and Daisy to their apartment. The officer had seen the bruises on the victim and noted that it was a sixteen inch drop from the couch to the carpeted floor. When he commented that he did not think Tori's injuries were consistent with a fall from the couch, respondent suggested that "maybe some Mexicans came in" while he was upstairs.

In a taped statement made at the police station the next afternoon, respondent admitted that only he and Daisy had custody of the child on the day she died. He claimed Tori was sick, but denied that she had any trouble

breathing. Daisy left to make a telephone call about 9:00 p.m. McGuire put Tori on the couch and went upstairs. He heard the baby crying and found her lying on the floor. Respondent took Tori upstairs and put her in bed. When Daisy returned she noticed that Tori was pale and having trouble breathing. Respondent thought her stomach was hurting so they took Tori to the hospital. Respondent denied hitting the child.

Daisy McGuire was granted immunity from prosecution. She testified that she hit Tori during the day while respondent was out; she was mad because the baby had cried all day. In her statement to the police, however, Daisy denied striking the child and offered no such testimony at the preliminary examination. Her testimony about when she injured Tori was inconsistent with the medical evidence and the time of death.

Since his arrest Daisy had spoken with respondent a number of times about Tori's death. She had discussed her earlier statement with the public defender who represented her husband, but refused to meet with the district attorney unless her own lawyer was present.

Another resident of the McGuires' apartment complex once saw respondent holding Daisy against the wall with his knee in her stomach and choking her as she tried to escape. On another occasion Daisy told the woman that respondent had hit her across the face. The woman also saw respondent feeding Tori. He roughly pinched the baby's cheeks and forced food into her mouth; marks appeared on Tori's face. Daisy told the woman that she was afraid to leave Tori with respondent because he "pinched her cheeks and did bad things." That

same day the woman saw marks on Tori's thighs, buttocks, and face.

A few days before the killing, Daisy and Tori stayed with some friends on Treasure Island. She spoke about going to a battered women's shelter and expressed concern that respondent might obtain custody of their child in a divorce action. She complained about respondent's treatment of Tori.

In its instructions to the jury, the trial court limited consideration of the other assaultive behavior and of Tori's earlier injuries as follows:

> Evidence has been introduced for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the Defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a clear connection between the other two offense[s] and the one of which the Defendant is accused, so

> that it may be logically concluded that if the Defendant committed other offenses, he also committed the crime charged in this case.

B. Procedural History

Respondent's conviction for second degree murder was affirmed by the California Court of Appeal on January 15, 1985. A copy of the opinion is attached as Appendix E. The California Supreme Court denied hearing on March 21, 1985.

Respondent's second petition for writ of habeas corpus was filed in the United States District Court for the Northern District of California on August 30, 1985.[1/] The district court denied the petition in an unpublished, written opinion filed on July 15, 1987. It found that the evidence of Tori's prior injuries was properly admitted under state law, and that no federal constitutional rights were violated by the evidence or the instructions in respondent's trial. *See*, Appendix C, at A-31 to A-36. The district court granted a certificate of probable cause to appeal on August 10, 1987.

The Ninth Circuit's first opinion was filed on May 8, 1989. *McGuire v. Estelle*, 873 F.2d 1323 (9th Cir. 1989). The court found that admission of evidence about Tori's prior injuries and the diagnosis of battered child syndrome was improper because it was not relevant to any

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1. An earlier, otherwise identical petition, was denied without prejudice on April 24, 1985, for failure to allege that state remedies had been exhausted.

disputed issue in the case. The prejudice to respondent was, according to the Ninth Circuit, exacerbated by the limiting instruction on the jury's consideration of that evidence. The court also criticized the state's grant of immunity to Daisy McGuire and suggested that the local authorities consider whether she fraudulently negotiated the immunity and if so whether it should be withdrawn.

The Ninth Circuit vacated its first opinion on April 23, 1990, and filed a second opinion on May 4, 1990. *McGuire v. Estelle*, 902 F.2d 749 (9th Cir. 1990). The court again found that it was error to admit the prior injury evidence, relying in part on Federal Rules of Evidence 401 and 404. In its view, the evidence of Tori's injuries and the diagnosis of battered child syndrome were admitted in violation of state law and were irrelevant under the federal rules. The court also found that the limiting instruction allowed the jury to consider the other injuries as evidence of guilt, a use it found to be improper under the Federal Rules of Evidence. Although it no longer questioned the grant of immunity, the court concluded that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. According to the Ninth Circuit, the evidence in the case established "mere shadows of guilt which leave ample room for reasonable doubt." *Id.*, at 756.

Rehearing and rehearing en banc were denied, but two circuit judges dissented from denial of en banc consideration. In their opinion, the panel improperly second-guessed the state courts' interpretation of state law and reversed without adequate demonstration of a federal constitutional violation. The judges also concluded that the panel's harmless error analysis was incomplete and

inadequate, and found the prosecution's case was "very strong indeed." Appendix D, at A-55. Finally, the dissent expressed concern that the decision could have a substantial, negative effect on the abililty of state officials to prosecute in cases of child abuse homicide. Appendix D (Kozinski, J. and Trott, J., dissenting).

REASONS FOR GRANTING THE PETITION

This Court has repeatedly reminded lower federal courts of the limited nature of review over state court judgments in habeas corpus actions. The Ninth Circuit's decision in this case reflects precisely the opposite view by ignoring the state's interpretation of its own law and relying upon the Federal Rules of Evidence as a basis for reversing a state murder conviction.

In its opinion affirming respondent's murder conviction, the California Court of Appeal noted that evidence of prior injuires has long been admissible under state law to support a diagnosis of battered child syndrome, which indicates simply that the child did not suffer her injuries by accidental means. *See* Appendix E, at A-64 to A-66. *People v. Jackson*, 18 Cal.App.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). Child abuse prosecutions "pose unique problems of proof" and are "commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse." *United States v. Leight*, 818 F.2d 1297, 1300-1301 (7th Cir. 1987). As a result, such cases demand "an even wider discretion than usual in admitting what is conceded to be extremely prejudicial evidence." *Id.*, at 1304. The Ninth Circuit itself recently acknowledged the importance of

battered child evidence in affirming a second degree murder conviction under federal law. *United States v. Boise*, 916 F.2d 497 (9th Cir. 1990).

Despite the admissibility of evidence about Tori's prior injuries under state law, and the acceptance of such evidence in federal prosecutions, the Ninth Circuit concluded that the evidence was improper in respondent's state court murder trial because respondent was not expressly connected to the infliction of those injuries. It thus concluded that the evidence was admitted "for no other purpose" than to demonstrate that respondent was a child abuser. The court also found that admission of the evidence was improper under state law because accidental death was not an issue in the case. 902 F.2d at 754. Having determined that the evidence was irrelevant, the Ninth Circuit then reviewed the instruction limiting its use by the jury. It held, apparently as a matter of constitutional law, that the instruction incorrectly informed the jury that it could "find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses." *Id.*, at 755. In doing so, the Ninth Circuit expanded the grounds for federal habeas corpus review by transforming a state's interpretation of its own rules of evidence into a means of federal review of a presumptively valid state judgment.

The Ninth Circuit's decision is at odds with the purpose of 28 U.S.C. § 2254. "The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases *de novo* but, rather, to review for violation of federal constitutional standards." *Milton v. Wainwright*, 407 U.S. 371, 377 (1972). "It is axiomatic that federal courts may intervene in the state judicial process only to

correct wrongs of a constitutional dimension." *Wainwright v. Goode*, 464 U.S. 78, 83 (1983). The Court has emphasized that the scope of habeas corpus is limited by "interests of comity and finality." *Teague v. Lane*, 489 U.S. 288, 308 (1989); *see also*, *Harris v. Reed*, 489 U.S. 255 (1989).

Last term the Court reaffirmed that "federal habeas corpus relief does not lie for errors of state law." The federal court must respect a state court's findings of fact and application of its own law, rather than engage in *de novo* review. *Lewis v. Jeffers*, ___ U.S. ___, 110 S.Ct. 3092, 3102 (1990). It may not "'peer majestically over the [state] court's shoulder'" in order to second-guess the state's interpretation of the facts. *Id.* "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer v. Smith*, ___ U.S. ___, 110 S.Ct. 2822, 2831 (1990). Thus, a federal court has no basis for disputing the state's interpretation of its own law. *Clemons v. Mississippi*, ___ U.S. ___, 110 S.Ct. 1441, 1447 (1990). Unfortunately, in "its haste to create a novel" due process right, *Morris v. Slappy*, 461 U.S. 1, 16 (1983), the Ninth Circuit disregarded these limitations and once again improperly expanded the basis for habeas corpus relief by finding that admission of evidence about prior injuries suffered by the victim violated state law.[2/]

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2. Earlier this term the Court granted certiorari to consider whether the Ninth Circuit had unduly expanded its habeas corpus jurisdiction by finding a violation of state law which prejudiced the defendant. *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989), *cert. granted*, ___ U.S. ___, 111 S.Ct. 39 (1990), *vacated as moot and remanded*, ___ U.S. ___, 59 U.S.L.W. 3339 (November 5, 1990). The

The evidence of Tori's prior injuries was admitted under well-established state law permitting such evidence. *See, e.g., Landeros v. Flood*, 17 Cal.3d 399, 409, 131 Cal.Rptr. 69, 73 (1976); *People v. Steger*, 16 Cal.3d 539, 549, n. 4, 128 Cal.Rptr. 161, 164, n. 4 (1976); *People v. Jackson*, *supra*; *see also*, opinion of the California Court of Appeal, Appendix E, at A-64 to A-66. The Ninth Circuit, relying on the same cases cited by the state court, nevertheless found that the battered child evidence was only admissible in California to prove that the injuries did not occur by accident. Because, according to the court, respondent did not claim that Tori's death was accidental, the evidence of prior injuries was irrelevant and incorrectly admitted. 902 F.2d at 754. Apart from the inappropriateness of correcting state courts on questions of the admissibility of evidence under state law, the holding has serious implications for prosecutors throughout the Ninth Circuit.

If the Ninth Circuit's opinion is allowed to stand, whenever a defendant has not specifically contested an element of the offense, admitting evidence which is relevant only to that element could result in reversal on federal habeas corpus. On the other hand, failure to introduce the evidence could result in a directed verdict of acquittal. It is, as the dissent from denial of rehearing en banc notes, an insoluable "Catch-22" for the proseuctor. *See*, Appendix D, A-50 to A-52. The creation of this dilemma is particularly inappropriate since federal courts

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concerns about inappropriate reliance upon state law as a basis for granting federal habeas corpus relief which were at issue in *Blair* are just as clearly presented by this case.

have "no supervisory authority over state judicial proceedings." *Smith v. Phillips*, 455 U.S. 209, 221 (1982). The Ninth Circuit has improperly expanded its federal habeas corpus jurisdiction through the expedient of reinterpreting state law. It has, in effect, reconstituted itself as a state appellate court. This, as the Court expressly held in *Lewis* and *Clemons*, it may not do.

The Ninth Circuit justifies its evaluation of state law by relying in part on the Federal Rules of Evidence. *See*, Appendix D, at A-49, n. 2. Those rules are not constitutionally based. *Dowling v. United States*, ___ U.S. ___, 110 S.Ct. 668, 674 (1990). As such, violation of the rules alone cannot constitute a federal constitutional violation, nor can the rules circumscribe a state's interpretation of its own rules of evidence. The Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly." *Dowling*, *supra*. "Rules of evidence are designed in the interest of fair trials. But unfairness in result is no sure measure of unconstitutionality." *United States v. Augenblick*, 393 U.S. 348, 352 (1969). Moreover, the rules generally do not prohibit the introduction of evidence, but rather limit the purpose for which it may be used. *Huddleston v. United States*, 485 U.S. 681, 687 (1988).[3/] When it enacted the rules, Congress was less concerned with the potential prejudicial effect of other crimes evidence "as it was with ensuring that restrictions would not be placed on the

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3. The Ninth Circuit has, in reviewing federal criminal prosecutions, recognized that Rule 404 is primarily inclusionary, as opposed to exclusionary. *See, United States v. Hadley*, ___ F.2d ___ (9th Cir. 1990), filed November 14, 1990 in No. 89-10428.

admission of such evidence." *Huddleston*, *supra*, at 688-689. The erroneous admission of evidence which results in a conviction is not sufficient to support a finding of federal constitutional error even on direct review of a federal conviction. *Dowling*, *supra*.

This case, however, does not involve a direct appeal from a federal conviction. It is a collateral attack on a state court judgment. The showing required to justify a reversal on habeas corpus from a state conviction is even greater than the plain error requirement on direct appeal. *Engle v. Isaac*, 456 U.S. 107, 134-135 (1982); *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

In addition, the Ninth Circuit has specifically allowed federal prosecutors to use precisely the same evidence of prior injuries and battered child syndrome found to be constitutionally prohibited in respondent's state trial, to support a second degree murder conviction under federal law. *United States v. Boise*, *supra*, 916 F.2d 497. The Ninth Circuit lacks justification for authorizing such evidence in federal prosecutions, while excluding the same evidence from identical state court proceedings, particularly given the absence of any supervisory authority over the state proceedings. *Smith v. Phillips*, *supra*.

The Ninth Circuit's holding that a limiting instruction on the use of other crimes evidence was prejudicial is equally erroneous. A jury instruction must itself infect the entire trial in order to establish a violation of due process. *Henderson v. Kibbe*, *supra*, 431 U.S. at 154. It is not enough to show that the instruction was undesirable, erroneous, or condemned; it must violate some due process right protected by the Fourteenth

Amendment. *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The state trial record does not support such a showing.

The instruction allowed the jury to consider evidence of prior similar acts to impeach the testimony of respondent's wife, to establish the battered child syndrome, and to find that respondent committed the present offense if it could logically be concluded that he committed the other offenses. The Ninth Circuit concluded, again in reliance on the Federal Rules of Evidence, that the evidence of prior injury to the victim was not explicitly connected to respondent and therefore could not be used to permit an inference of guilt in this case. This precise objection was rejected by the state trial court, which noted that if the jury found from the evidence of prior injuries that the victim was a battered child, it could then conclude that her death was not accidental. Once it made that finding, the jury could consider respondent's contrary assertions to his wife and to the police that the death was accidental to be lies indicating a consciousness of guilt, and further infer that respondent murdered his baby. Similarly, a finding by the jury that respondent hit his wife and baby as described in the testimony, coupled with his lies about the cause of Tori's fatal injuries, would properly support a finding of guilt.

This use of the evidence was proper under state law and nothing in the Ninth Circuit's opinion suggests a constitutional basis for challenging the instruction. Indeed, the federal courts have recognized, in prosecutions for child abuse homicides under federal law, that proof of prior injuries demonstrating the death was not accidental, coupled with the defendant's custody of the child when

the fatal blows were inflicted, will support a conviction for murder. *See, e.g., United States v. Boise, supra*, 916 F.2d at 500; *United States v. Harris*, 661 F.2d 138, 141 (10th Cir. 1981); *United States v. Bowers*, 660 F.2d 527, 529 (5th Cir. Unit B 1981); *United States v. Woods*, 484 F.2d 127, 133 (4th Cir. 1973).[4]

"Tori McGuire's short life was the type of horror no sentient being should have to endure." Appendix D, at A-46. Unfortunately, cases like this and deaths such as Tori suffered are much too common. A recent survey shows that 1,237 child abuse fatalities were reported nationwide in 1989. The National Center on Child Abuse Prevention Research, *Current Trends in Child Abuse Reporting and Fatalities: The Results of the 1989 Annual Fifty State Survey*, p. 14 (March 1990). The number of reported child abuse homicides has increased by 38% since 1985. *Id.*, at 15. Children died at the rate of one murder by a parent or guardian per week in Los Angles County in 1989. Los Angeles Times (November 14, 1990) at page 1A, column 2. In Chicago, 41 children under the age of 10 died in reported homicides last year. Of those victims, 32 were, like Tori McGuire, one year old or younger. Chicago Tribune (May 20, 1990) at page 1.

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4. As noted, the evidence of prior injuries was admitted on three grounds. Although the Ninth Circuit, albeit incorrectly, found one basis to be improper, it completely ignored the other two. If the evidence would have been admitted anyway, a showing of constitutional error, much less prejudice, becomes substantially more difficult. The state court found that the evidence was proper to prove the battered child syndrome and to rebut a claim of accident. As a result, the state court did not have to consider the other grounds of admission. The federal court's refusal to do so, however, is unexcused and unexplained. *See*, Appendix D, at A-54 to A-55.

Child abuse cases "present many unusual problems of proof." *United States v. Leight, supra*, 818 F.2d at 1304. There are usually no witnesses, often the victim is dead, and even if the victim survives she may be too young to describe what happened. As a result, the cases are "commonly built upon circumstantial evidence showing a pattern of repeated injuries suggesting child abuse." *Id.*, at 1301. Absent a clear violation of a federal constitutional right, no justification exists for removing from state prosecutors their most effective, and sometimes only, weapon for convicting the abusers. The Ninth Circuit, however, has done precisely that. As persuasively argued in the dissent from denial of rehearing en banc, the decision places in jeopardy any Ninth Circuit *state* court prosecution for a child abuse homicide in which evidence of prior injuries is admitted. Appendix D.

In *Maryland v. Craig*, ___ U.S. ___, 110 S.Ct. 3157 (1990), the Court recognized the states' "interest in the physical and psychological well-being of child abuse victims." 110 S.Ct. at 3167; *see also New York v. Ferber*, 458 U.S. 747, 757 (1982) [the courts will attempt to protect the physical and emotional well-being of children]. The Ninth Circuit's improper, expansive view of its habeas corpus jurisdiction ignored that interest. Certiorari should be granted to restore to the states their ability to effectively prosecute and punish those who prey upon the most defenseless members of our society.

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CONCLUSION

For the reasons stated above, we respectfully request that the Petition for Writ of Certiorari to the Ninth Circuit be granted.

Dated: December 13, 1990.

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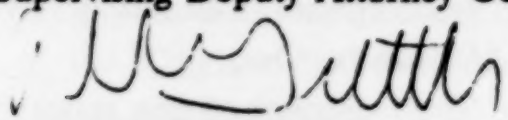

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APPENDICES

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant,	)	No. 87-2522
v.	)	D.C. No. CV-85-6521-TEH
WAYNE ESTELLE, Warden, Defendant-Appellee.	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted June 14, 1988
San Francisco, California
Opinion filed May 8, 1989 and withdrawn April 23, 1990

Filed May 4, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*****/, District Judge.

Opinion by Judge Wiggins

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial, coupled with an instruction that permitted the jury to consider those prior acts as evidence of his guilt of the crime charged, were errors that denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

Because a proper consideration of McGuire's due process claim requires weighing the prejudice to him of the error he alleges, we examine the trial testimony in some detail.

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six month old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

The father, McGuire, was charged with second degree murder of his child.

At trial, the prosecution called Dr. Levine, the doctor who examined the baby at the hospital. She testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating a healed tearing around the anus. Doctor Levine opined that the rectal tear was not caused by constipation or fecal impactment. She testified that such scarring probably resulted from the forceful insertion of a finger or some other foreign object. The doctor also testified that the baby had suffered from seven earlier rib fractures.

A different doctor performed an autopsy on the baby and testified that there were at least 17 contusions on the baby's chest and 29 more on her abdomen. He testified that his examination of the internal organs

revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her intestine was lacerated. The doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire made timely objection to all evidence of prior injuries as not being connected to him. The objections were overruled.

None of the foregoing evidence of injury to the child included evidence of who caused the injuries to her.

The prosecution also called a witness who had overheard McGuire talking to his wife in the emergency room of the hospital. The witness stated that McGuire's wife asked him "what really had happened?" and McGuire is reported to have responded that the baby had fallen from the couch.

A police officer was called by the prosecution. He testified that McGuire had told him that the child had fallen from the couch. The officer than told McGuire that the baby's injuries were inconsistent with a fall from the couch. McGuire thereupon responded that "maybe some Mexicans came in while I was upstairs."

McGuire's wife was next called as a witness by the prosecution. She was granted transactional immunity for her testimony although she had made no statement to the prosecutor prior to the trial. When asked about the circumstances of the baby's death, she testified that she, and not her husband, had beaten the baby. She gave a confused account of having struck the baby in the

afternoon of July 7, 1981 and that the child did not move, cry, or cough thereafter.

McGuire's wife testified that on the afternoon of the 7th, after she struck the child, she left the house for about ten minutes and when she returned, the child was not breathing. She stated that she asked her husband what had happened and he said the child had fallen from the couch and struck the walker. She also testified that several weeks prior to the baby's death, she inserted her finger into the baby's rectum in an attempt to relieve her of constipation. She also testified to staying at a neighbor's house for four days prior to the 7th and had made inquiries about a battered woman's shelter.

The prosecution introduced evidence that a fall from a couch could not have produced the injuries causing the baby's death. The prosecution also introduced evidence that McGuire had treated the baby roughly in the past.

The defense countered with witnesses who testified they had never seen McGuire abuse the child. McGuire did not testify in his own defense.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254(a). Order to show cause issued on February 26, 1986. In its original response, the state of

California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. EXHAUSTION

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a

second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

II. THE CONSTITUTIONALITY OF APPELLANT'S CONVICTION

We review the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to habeas relief only if he is held in violation of the constitution, laws, or treaties of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that the procedures used to convict him in state court violated his fourteenth amendment right to due process. U.S. Const. Amend. XIV. We agree.

A claim for deprivation of due process will succeed only if the trial court's errors rendered the trial arbitrary or fundamentally unfair. *Pennywell v. Rushen*, 705 F.2d 355, 357 (9th Cir. 1983). In the instant case we find that the aggregate effect of the admittance of irrelevant, highly prejudicial evidence, compounded by the trial court's instruction to use that evidence in the most

1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

prejudicial manner possible, rendered appellant's trial arbitrary and fundamentally unfair.

A. THE ADMITTANCE OF IRRELEVANT, PREJUDICIAL EVIDENCE

The trial court admitted extensive evidence of prior physical abuse the baby had suffered, including evidence of possible sexual abuse. However, that evidence has no relevance to appellant because the prosecution did not establish that appellant inflicted those injuries.

In order for evidence to be relevant, it must have some probative value. *See, e.g.*, Fed.R.Evid. 401 (evidence to be relevant must make the determination of the action more probable or less probable than it would be without the evidence). Evidence cannot have probative value unless a party connects it to the defendant in some meaningful way. *See, e.g., United States v. Hooten*, 662 F.2d 628, 635 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982) (in order for prior act evidence to be admissible under the Fed.R.Evid. it must be "similar and close enough in time to be relevant"); *People v. Rivera*, 41 Cal.3d 388, 392, 710 P.2d 362, 364, 221 Cal.Rptr. 562, 564 (1985) (in bank) ("In order for evidence of a prior [act] to have a tendency to prove the defendant's identity as the perpetrator of the charged offense, the [prior act and the charged offense] must have enough shared characteristics to raise a strong inference that they were committed by the same person. . . . It is not enough that the two acts contain common marks.").

In the instant case, the prosecution made no such connection. The prosecution elicited evidence that McGuire was rough with the baby, and that on one occasion McGuire had squeezed the baby's cheeks. Daisy McGuire also stated that she feared leaving the baby alone with McGuire. We recognize the temptation to find that such evidence is enough to infer that McGuire caused the prior rectal tearing and the broken ribs. However, we cannot permit a jury that temptation. Evidence of McGuire's petty meanness does not establish that he committed, or is even capable of, the extensive physical abuse inflicted on the child. It is precisely because anyone, including Daisy McGuire, could have inflicted those injuries that makes the prior injury evidence irrelevant.

We emphasize that the trial court's error was not simply that it admitted the prior evidence under the wrong evidentiary theory. Nor do we dispute that there are constitutionally permissible uses for admitting evidence of prior bad acts. *See* Fed.R.Evid 404(b) (evidence of other crimes, wrongs or acts may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge identity, or absence of mistake or accident); *United States v. Lewis*, 837 F.2d 415, 418-419 (9th Cir.), *cert. denied*, 109 S.Ct. 304 (1988) (evidence of prior child abuse properly admitted to show intent). However, acts which the prosecution did not connect to appellant cannot be characterized as *his* prior acts.

Furthermore, we find the introduction of such prior injury evidence highly prejudicial. The prosecution introduced evidence of prior injuries to the baby to establish that appellant was a child abuser, and for no

other purpose, in a murder trial for the death of his child. The trial court incorrectly admitted the evidence pursuant to California law allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

However, in the instant case, no claim was made that the child died accidentally. The prosecution attempted to prove Mark McGuire deliberately did it. The defense attempted to prove Daisy McGuire deliberately did it. Although the prosecution did not succeed in proving that the appellant caused the prior injuries, we cannot ignore that a trial of the grisly murder of an innocent baby implicates highly charged emotions. The unproven characterization of appellant as a child abuser maximized the prejudice flowing from the irrelevant evidence. *See Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988) (granting habeas relief where prejudicial effect of evidence so outweighed probative value that result was a denial of fundamental fairness); *Osborne v. Wainwright*, 720 F.2d 1237 (11th Cir. 1983) (reversing and remanding a denial of habeas corpus petition on basis that prejudicial effect of evidence might have risen to such magnitude as to deny fundamental fairness); *Bisaccia v. Attorney General of State of New Jersey*, 623 F.2d 307 (3d Cir. 1980) (same).

B. IMPROPER JURY INSTRUCTIONS

The trial court did not merely admit irrelevant, highly prejudicial evidence without comment. The trial court *instructed* the jury to use that evidence in the most improper way possible. We assume that the jury followed its instructions. *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585, 604 (1985). The trial court's jury instructions stated:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he had a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
>
> 2. To establish the battered child syndrome, and
>
> 3. Also a connection between the other two offense (sic) and the one of which the defendant is accused *so that it may be logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case.*
>
> You are not permitted to consider evidence for any other purpose.

(emphasis added).

Subsection 3 of the instruction is erroneous.[2/] It permits the jury to make a direct determination of guilt by concluding that appellant committed prior bad acts. The rejection of such use of circumstantial character evidence in criminal cases has become "so deeply imbedded in our jurisprudence as to assume almost constitutional proportions. . . ." Fed.R.Evid. 404(a) advisory committee's note.

Not only have we never condoned an instruction which permits a finding of guilt based on a conclusion that the appellant committed prior bad acts, we have consistently stressed the importance of a *limiting* instruction to confine the use of prior bad act evidence to the proper purpose for which the court admitted it. *See United States v. Green*, 648 F.2d 587, 593 (9th Cir. 1981) (admission of bad act evidence in conjunction with failure of trial judge to provide limiting instruction following admission of bad act evidence required reversal); *cf. Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985) (no due process violation resulted from wrongful admission of prejudicial evidence where instructions limited use of that evidence to find intent); *United States v. McCown*, 711 F.2d 1441, 1454 (9th Cir. 1983) (no due process

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2. It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

violation resulted from admission of prior bad acts evidence where prejudice was minimal and trial judge offered to give a limiting instruction).

The damage done by subsection 3 is not limited by a qualifying instruction by the court. Nor is subsection 3 limited by the preceding subsections of the instruction. The first subsection simply warned the jury not to use the evidence of prior bad acts to find that McGuire was a bad person and therefore infer that McGuire was likely to have committed this crime. Subsection 3, however, informed the jury that it may find McGuire guilty of the offense charged if it logically concluded that he committed the other earlier offenses. For these reasons, the faulty instruction considered along with the admittance of the prejudicial evidence "so infected the entire trial that the resulting conviction violate[d] due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). Nor do we believe that this error can be considered harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming. *See Dudley v. Duckworth*, 854 F.2d 967, 972 (7th Cir. 1988) (error not harmless even when evidence of petitioner's guilt was "impressive but not overwhelming.").

III. CONCLUSION

We find that the jury instruction which permitted the direct determination of guilt from evidence of prior injuries not connected to McGuire denied him due process. The severity of these errors sets this case apart

from arguably similar cases in which we rejected claims that evidentiary error rendered a trial fundamentally unfair. For example, in *Lewis*, we found no due process error where the trial court admitted evidence of prior child abuse in a defendant's trial for the murder of his son. 837 F.2d at 418-19. However, *Lewis* suffered from neither of the errors we find determinative in the instant case. In *Lewis*, the testimony of two witnesses connected the defendant to the infliction of the prior injuries, and the trial court provided a limiting instruction. *Id.*, at 419.

Because the prejudicial effect of the errors discussed above amount to a denial of due process, we grant McGuire's habeas petition. However, we are also not blind to the fact that apart from those errors, only the barest threads connect McGuire to the crime. True, given the pattern of most child abuse cases, it is not unreasonable to assume that one or both of the baby's primary care givers were responsible for the baby's injuries and death. We are also mindful that in the emergency room, McGuire answered unconvincingly in response to Daisy McGuire's accusation that McGuire bore responsibility for the baby's injuries leading to death. And evidence existed that McGuire had treated his wife and the baby roughly in the past. But these are mere shadows of guilt which leave ample room for reasonable doubt. Due process requires more than a simple intuitive feeling that the father may be guilty. It requires convincing proof.

We REVERSE and REMAND for a new trial.

APPENDIX B

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE, Plaintiff-Appellant,	)	No. 87-2522
v.	)	D.C. No. CV-85-6521-TEH
WAYNE ESTELLE, Warden, Defendant-Appellee.	)	OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
June 14, 1988 -- San Francisco, California

Filed May 8, 1989

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

Opinion by Judge Wiggins

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

SUMMARY

Reversing the district court's denial of a petition for a writ of habeas corpus and remanding for a grant of a conditional writ, the court held that the admission of evidence of prior acts violated due process.

Appellant Mark McGuire was convicted of second degree murder in the death of his infant daughter. At the trial, McGuire's wife was granted transactional immunity by the prosecution. The trial judge admitted evidence of prior injury to the child, which also indicated possible sexual abuse. The jury was instructed on the prior injury evidence in such manner that if they found that McGuire had committed any previous offenses against the child, they could find him guilty of the charged offense.

[1] An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error results in the denial of fundamental fairness. **[2]** The probative value of evidence of prior injuries was negligible since the only permissible proposition the evidence could prove was whether the injuries were accidental or intentional and the defense was not predicated on proof of accident. **[3]** The prejudicial quality of the evidence was exacerbated by the instruction and the instruction alone probably constituted error of constitutional dimension.

COUNSEL

Ann Hardgrove Vorhis, San Francisco, California, for the plaintiff-appellant.

Herbert F. Wilkinson, Supervising Deputy Attorney General, San Francisco, California, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

Mark McGuire ("McGuire") appeals from the district court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254(a). McGuire was convicted of second degree murder and is now serving a fifteen year to life sentence in a California state prison. McGuire contends that the admission of evidence of prior acts against him at his trial was error and denied him due process of law under the Fourteenth Amendment. We find that his contention has merit and REVERSE.

FACTS AND PROCEEDINGS BELOW

At about 9:00 p.m., on July 7, 1981, McGuire and his wife brought their six-month-old baby girl to the emergency room of a hospital in Hayward, California. The baby was bluish in color and was not breathing. The hospital staff were unable to save the baby and she was pronounced dead at about 9:45 p.m.

At trial, one of the baby's treating physicians testified that the child was essentially lifeless and without vital signs when she was brought into the hospital. The doctor also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruise marks around it, black and blue marks on her ears, and scar tissue indicating tearing around the anus. A doctor who performed an autopsy on the body testified that there were at least seventeen contusions on the baby's chest and twenty-nine more on her abdomen. Examination of the internal organs revealed that the liver was split in half, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of her large intestine was lacerated. Over McGuire's objection, the doctor also testified to rectal tearing at least six weeks old and to evidence of several partially healed rib fractures approximately seven weeks old.

McGuire's wife was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she, and not her husband, had beaten the baby.

On March 19, 1982, the jury returned a verdict of second degree murder against McGuire. On January 15, 1985, the California Court of Appeal affirmed his conviction. McGuire petitioned for a hearing before the California Supreme Court. On March 21, 1985, the California Supreme Court issued a "postcard denial" of the petition. It did so without any citation or comment.

On August 30, 1985, McGuire filed a petition for writ of habeas corpus in federal district court under 28 U.S.D. § 2254(a). Order to show cause issued on

February 26, 1986. In its original response, the state of California did not answer on the merits but argued that McGuire had failed to exhaust his state remedies. The district court, relying on *Maxwell v. Sumner*, 673 F.2d 1031, 1034 n.1 (9th Cir.), *cert. denied*, 459 U.S. 976 (1982), ruled against the state on the exhaustion issue and ordered it to answer on the merits. After the state did so, the district court denied McGuire's petition on July 15, 1987. It held that the admission of the evidence of the prior injuries to the child, and a jury instruction relating to that evidence, was proper under California evidence rules. The court also found that the evidence was relevant to contradict a pretrial statement made by McGuire, and offered at trial by the prosecution, that the baby's injuries were caused by her falling off a couch. The court also rejected McGuire's fifth amendment prosecutorial misconduct and denial of discovery claims. McGuire timely appealed. We have jurisdiction under 28 U.S.C. § 1291.

I. *Exhaustion*

28 U.S.C. § 2254(b) states: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . ." On direct appeal to the California appellate court, McGuire raised four issues: (1) admission of evidence of prior injuries to the baby and an errant "other crimes" instruction, (2) a fifth amendment claim that the original trial court erroneously admitted evidence of a statement

made to the police that "some Mexicans" might have come into his home and presumably injured the baby, (3) a second fifth amendment claim relating to statements he made to the police without *Miranda* warnings the day before he was arrested, and (4) a prosecutorial misconduct claim. In his petition to the California Supreme Court, McGuire raised only the issues of the evidence of prior injuries and the "Mexican intruder" statement. The California Supreme Court denied his petition without a hearing, comment, or citation. In his petition for habeas corpus, however, McGuire raised all four claims that he had previously raised before the California appellate court.

A petition containing both exhausted and unexhausted claims must be dismissed by the federal courts. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). Although McGuire presented only two of his four issues to the California Supreme Court, he has properly exhausted his state remedies. In *Maxwell*, we stated that:

> [I]f a claim has been briefed and argued before the [California] court of appeal, failure to assert it in the petition to the California Supreme Court does not normally waive the claim . . . [W]hen the California Supreme Court grants a hearing, its order effectively vacates the order of the court of appeal; the California Supreme Court then decides each issue in the case as if it were on original appeal from the trial court, "regardless of the grounds relied on in the petition."

Maxwell, 673 F.2d at 1034 n.1 (citations omitted).[1] Thus we may reach the merits of McGuire's claims.

II. *Past Injuries.*

This court reviews the district court's denial of a petition for a writ of habeas corpus de novo. *Weygandt v. Ducharme*, 774 F.2d 1491, 1492 (9th Cir. 1985). A state prisoner is entitled to relief under 28 U.S.C. § 2254 only if he is held in violation of the Constitution or laws of the United States. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); 28 U.S.C. § 2254(a). McGuire contends that admission of evidence of the baby's prior injuries, coupled with a jury instruction that allowed the jury to infer that if he committed the prior offenses he committed the charged crime, deprived him of due process. An erroneous evidentiary ruling will not cause a writ to issue unless a specific constitutional guarantee has been violated or the error is of such magnitude that the result is a denial of fundamental fairness. *United States v. DeRobertis*, 738 F.2d 168, 170 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). Before a federal court may overturn a state court conviction based on an incorrect or

1. The *Maxwell* "rule" will no longer be effective for petitions presented to the California Supreme Court after March 6, 1985. On that date new California Supreme Court appellate rules came into effect. Presently, the California rules provide that "[o]nly the issues set forth in the petition and answer or fairly included in them need be considered by the court." Cal. Rules Sup. Ct. & Cts. of Appeal 28(e)(2) and Advisory Committee Comment, ¶ 4. The present case, however, is governed by *Maxwell*. The appellant filed his petition for hearing on February 26, 1985, before the effective date of the new California rules.

erroneous jury instruction, "it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. 141, 146 (1973). The erroneous jury instruction must have rendered the trial so fundamentally unfair as to have denied McGuire due process. *Ahlswede v. Wolff*, 720 F.2d 1108, 1111 (9th Cir. 1983) (per curiam), *cert. denied*, 469 U.S. 873 (1984).

At trial, the prosecution introduced evidence that the baby had been physically abused in the past. Some of this evidence also indicated possible sexual abuse. The evidence was admitted pursuant to California law allowing such evidence to show that a child was a victim of the "Battered Child Syndrome." "The syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . ." *People v. Jackson*, 18 Cal.App.3d 504, 506, 95 Cal.Rptr. 919, 921 (1971); *see also People v. Steger*, 16 Cal.3d 539 549 n.4, 546 P.2d 665, 671 n.4, 128 Cal.Rptr. 161, 167 n.4 (1976). Proof of the syndrome "essentially means that the victim's injuries were not inflicted by accidental means. . . ." *Landeros v. Flood*, 17 Cal.3d 339, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976). In other words, proof of the syndrome demonstrates that a child has suffered repeated injuries over a period of time. These cases demonstrate that the California courts have been careful to limit proof of the syndrome to show that the child had not accidentally suffered the injuries. The additional finding that the injuries were probably caused by a particular person may not be made simply on the basis of proof of the syndrome

itself. *See Jackson*, 18 Cal.App.3d at 507, 95 Cal.Rptr. at 921.

Jackson and *Landeros* make clear that proof of the syndrome does not prove who caused the injuries. That fact, though it may be inferred from proof of who was in contact with or cared for the child, is separate and distinct from proof of the syndrome itself. *Id.* In the case at bar, no one claimed that the child died accidentally. The *prosecution* introduced McGuire's pretrial statement that the injuries that killed the baby might have been caused by her falling off the couch. McGuire's defense at trial was not predicated on this or any other proof of accident. Rather, he attempted to prove that his wife had killed the baby. The undisputed evidence of the massive injuries to the baby overwhelmingly refuted any inference of accidental death. The only permissible proposition this evidence could prove was whether the baby had suffered accidental or intentional injuries. This proposition was not at issue in this case. Thus, the probative value of the evidence of these prior injuries was negligible.

In addition, the prejudicial nature of this evidence was inherently great. *Cf. DeRobertis*, 738 F.2d at 171 (in a due process analysis of questioned evidence, the issue is whether the probative value of the evidence outweighs the prejudice to the accused). Proof of prior injuries to a small baby, coupled with the sexual nature of some of the injuries, inevitably prejudices McGuire. More significantly, there was little proof that McGuire was responsible for these injuries. It is certainly logical to infer that the primary care givers of the baby hurt and sexually molested the child on some prior date. The jury, however, was

presented with no direct proof of whether McGuire or his wife caused these prior injuries. Either could have been responsible. One possibility, however, had been foreclosed by the prosecution. By offering the wife immunity, the jury was left with only one option -- to find McGuire guilty of the murder. Proof of the prior injuries, not necessary to prove that the baby's death was purposeful, could only have further prejudiced McGuire in front of the jury.

The prejudicial quality of the evidence was exacerbated by an instruction given to the jury. The trial court instructed the jury on the prior injury evidence as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. . . . Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show
>
> . . .
>
> a connection between the other two offenses and the one of which the defendant is accused, so that it may be logically concluded that if the defendant committed the other offenses, he also committed the crime charged in the case.

This instruction specifically told the jury that if it thought McGuire committed the other two "offenses" they could find him guilty of the charged offense. The instruction alone would probably constitute error of constitutional

dimension. *See Butcher v. Marquez*, 758 F.2d 373, 378 (9th Cir. 1985); *United States v. Winters*, 729 F.2d 602, 604 (9th Cir. 1984). Certainly, coupled with the inherent prejudicial quality of the evidence itself, the error was of such magnitude to deny McGuire a fundamentally fair trial. We hold that McGuire was denied due process by admission of this evidence and its associated jury instruction.[2]

CONCLUSION

We are troubled that our disposition does not do justice in this case. A baby has been killed. Only the father and mother had access to the baby. One or the other, or perhaps both, are responsible for the death. This appeal, however, only concerns McGuire. Perhaps the state authorities should examine whether the mother fraudulently negotiated her grant of immunity, and if so, whether the immunity can be withdrawn. We express no opinion as to whether the evidence justifies a retrial of McGuire, his wife, or both, for murder.

We REVERSE the district court's denial of McGuire's petition for a writ of habeas corpus. We REMAND to the district court for the grant of a conditional writ. The state is permitted 90 days from this remand to refile.

REVERSED AND REMANDED.

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2. Given our disposition of this case, we do not reach or decide the appellant's *Miranda* claim.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK OWEN McGUIRE,	)	
	)	
Petitioner,	)	No. C 85-6521 TEH
	)	
v.	)	ORDER
	)	
WAYNE ESTELLE,	)	
	)	
Respondent.	)	

Petitioner Mark McGuire was convicted of second degree murder in Alameda County Superior Court for the killing of his infant daughter. On May 12, 1982, petitioner was sentenced to a term of 15 years to life for the murder, and is currently serving this sentence at the California Men's Colony in San Luis Obispo. The California Court of Appeal affirmed his conviction, and the California Supreme Court denied his petition for a hearing. Petitioner applied to this Court for a writ of habeas corpus, alleging violations of his federal constitutional rights by the state trial court that convicted him, and this Court issued an Order to Show Cause. There are presently five claims before this Court: 1) denial of due process based on the improper admission of prior act evidence; 2) denial of due process based on erroneous jury instructions with respect to the admission

of prior act evidence; 3) violation of the procedural protections afforded by *Miranda v. Arizona*, 384 U.S. 430 (1966), based on the improper admission of a statement at trial; 4) denial of due process based on prosecutorial misconduct during the prosecutor's closing argument; 5) denial of due process based on denial of discovery. Having considered the papers of both parties and the entire record presented, this Court hereby denies petitioner's application for a writ of habeas corpus.

FACTS

About 9:00 p.m. on July 7, 1981, petitioner and his wife brought their six month old baby daughter to the Emergency Room of Kaiser Hospital in Hayward. The screening nurse noticed that the baby was bluish in color and not breathing. She immediately took the baby to an emergency treatment room, and then returned to the screening area to obtain a medical history. Petitioner told the nurse that the baby had a cold recently and had hit her head that morning when she fell off of the couch. The efforts of doctors to save the baby were unavailing, and she was pronounced dead at 9:45 p.m.

Sharon Levine, M.D., assisted in treating the baby and testified at trial that the child was essentially lifeless with no vital signs when brought to the hospital. Dr. Levine also testified that the baby had a large and relatively recent bruise on the upper left chest area with multiple bruises around it, black and blue marks on her ears, and scar tissue indicating tearing around the rectum. An autopsy performed by Paul Herman, M.D., on July 8 revealed at least 17 contusions on the baby's chest, and

29 more on her abdominal area. When he examined her internal organs, Dr. Herman found that the baby's liver was split apart, her pancreas was lacerated and split apart, her lower right lung and large vein from the heart were damaged, and part of the large intestine was lacerated. Dr. Herman also discovered evidence of rectal tearing, which was a least six weeks old, and evidence of several partially healed rib fractures which were approximately seven weeks old.

The police arrived at Kaiser Hospital at 9:45 p.m., about the same time the baby was pronounced dead. The police separated the McGuires and briefly questioned them at the hospital about the baby's injuries. Petitioner indicated to Officer Lapic that the baby might have fallen off the couch and struck the walker which was next to it, although he was not sure. Petitioner was not given *Miranda* warnings before or during the questioning at the hospital, and he was not informed by police or by hospital personnel that the baby had died.

Petitioner and his wife were then taken to the Hayward Police Department in separate cars, and separately questioned there without *Miranda* warnings. Petitioner's wife told police that she had not hit the baby and that she did not know whether her husband had. At the end of the interview, the police told her that the baby was dead. Petitioner told police that his wife had gone outside to make a telephone call, leaving the baby on the couch, and that he heard the baby cry while upstairs using the bathroom. When he came downstairs, he said, he found the baby lying on the floor. At the end of the interview, the police told him the baby had died but that

they would not know the cause of death until the coroner completed an autopsy.

The police then drove petitioner and his wife to their apartment, had them sign a "Consent to Search" form, and then proceeded to take pictures and measurements of the home. Following the search of the apartment, petitioner was interviewed briefly in the parking lot to determine whether inordinate pressure had been applied to the baby's chest in an effort to revive her. In addition, Officer Lapic questioned petitioner outside the presence of other officers about the origin of the baby's bruises and was told that "Maybe some Mexicans came through the door" while he was upstairs, a statement that was not revealed until Officer Lapic's testimony at trial. No *Miranda* warnings were given up to this point.

The police called the McGuires the next day, July 8, and asked them to come to the station to discuss the coroner's report. Petitioner arrived at the station for questioning and there was advised for the first time of his rights under *Miranda*. He waived his rights and proceeded with the interview. About halfway through the interview, he was told that the coroner's report indicated the baby had been beaten to death. Petitioner was arrested at the termination of the interview. His wife was not arrested and was granted transactional immunity by the prosecution. At trial, testifying for the prosecution, she stated for the first time that she had beaten the baby just prior to her husband's arrival at the house on July 7.

DISCUSSION

1. Admission Of Prior Act Evidence

In addition to Dr. Levine's testimony that the baby had sustained at least 46 contusions on her chest and abdomen, evidence was introduced of several partially healed rib fractures which were about seven weeks old and of a tearing wound of the rectum which was about six weeks old. Based on this evidence of past injuries, in addition to the more recent injuries causing death, both Dr. Levine and Dr. Herman concluded at trial that the baby was a battered child. Petitioner now argues that this evidence of prior injuries to the baby, for which he was not on trial and to which he was not tied, was prejudicial and denied him due process of law.

For the limited purpose of showing that injury or death resulted from nonaccidental means, California courts have allowed admission of evidence of prior acts under California Evidence Code Section 1101(a). *See People v. Bledsoe*, 36 Cal.3d 236, 249 (1984). A diagnosis of battered child syndrome, based on evidence of past injuries, is not an opinion that any particular person caused the injuries, but relates solely to the likelihood that the injuries were accidentally inflicted. *People v. Jackson*, 18 Cal.App.3d 504, 506-507 (1971). In this case, evidence of the two types of prior injuries was admitted by the trial court to support a diagnosis of battered child syndrome and prove that the baby's death was not accidental. This was a proper use of evidence under California evidence rules.

Since the evidence was admissible under state evidentiary rules, petitioner must demonstrate that a constitutional right was implicated by its use in order to merit habeas corpus relief. *Engle v. Isaac*, 445 U.S. 107, 119 (1982). Introduction of evidence must be so prejudicial as to result in a denial of fundamental fairness. *Palmer v. DeRobertis*, 738 F.2d 168, 170 (7th Cir. 1984). No showing of prejudice has been made by petitioner with respect to admission of prior act evidence. Petitioner argues that the prior act evidence was irrelevant, because no defense of accident was ever presented, and cumulative, because testimony of doctors at trial already established that death was not the result of accident without resort to prior act evidence.

The evidence, however, was relevant to the prosecutor's case-in-chief, despite the lack of an accident defense, in order to show that death was the result of criminal agency and to rebut the statement introduced at trial that the baby may have died from falling off of a couch. In addition, the contention that the evidence was cumulative is speculative on petitioner's part. Even though the testimony of Dr. Levine supported the view that death was not the result of accident, without resort to prior act evidence, it cannot be said that this testimony alone conclusively established that position. Thus, the prosecution was allowed to introduce additional evidence, including evidence of prior injuries, to show the battered child syndrome and prove that death was not the result of accident. Moreover, even if admission of prior act evidence was irrelevant and/or cumulative, petitioner has not shown that it was so prejudicial as to amount to a denial of fundamental fairness. *See DeRobertis*, 738 F.2d

at 170; *Cronnon v. State of Alabama*, 587 F.2d 246, 250 (5th Cir. 1979), *cert. denied*, 440 U.S. 974 (1979); *Thomas v. Cardwell*, 626 F.2d 1375, 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 889 (1981).

2. Jury Instructions Concerning Evidence Of Prior Acts

The state trial court instructed the jury on the use of prior acts evidence, including evidence of the two prior injuries to the baby, as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed acts similar to those constituting a crime other than that for which he is on trial. Such evidence, if believed, was not received, and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit crimes. Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to show three things:
>
> 1. The impeachment of Daisy McGuire's testimony that she had no cause to be afraid of the defendant,
> 2. To establish the battered child syndrome, and
> 3. Also a connection between the other two offenses and the one of which the defendant is accused, so that it may be

> logically concluded that if the defendant committed other offenses, he also committed the crime charged in the case. You are not permitted to consider evidence for any other purpose.

Petitioner argues that Part 3 of this instruction improperly allowed the jury to base its verdict on acts for which he was not on trial and to which he was not connected, instead of limiting the use of the prior act evidence to show absence of accident.[1/]

Federal habeas corpus relief is not available to set aside a conviction because of an erroneous jury instruction unless the error rendered the trial so fundamentally unfair as to deny due process. *Ahlswede v. Wolff*, 729 F.2d 1108, 1111 (9th Cir. 1983); *Quig v. Crist*, 616 F.2d 1107, 1111 (9th Cir. 1980), *cert. denied*, 449 U.S. 922 (1980); *Shepard v. Nelson*, 432 F.2d 1045, 1046 (9th Cir. 1970);

1. Petitioner also argues that Part 3 of this instruction allowed the jury to connect testimony that he treated the baby roughly on one occasion and that he slapped his wife on another occasion to the offense charged, because the jury might have believed those to be the "other two offenses" referred to. In reviewing the instruction, we find no merit to this contention. Part 1 and 2 of the jury instructions sufficiently indicate the use to which evidence of those two prior acts was to be put -- the slapping incident to rebut Daisy McGuire's testimony that she had no cause to be afraid of her husband, and the rough handling incident to rebut Daisy's testimony and help establish the battered child syndrome. Moreover, the reference in Part 3 of the instruction to "the other two offenses," when read in the context of the entire instruction and the trial, can only mean to refer the jury to the two prior injuries to the baby, not the slapping and rough handling incidents. Although the "two offenses" should have been specifically named in the instruction, this lack of clarity did not significantly prejudice petitioner's case at trial. *See United States v. Pruitt*, 763 F.2d 1256 (11th Cir. 1985).

Trujillo v. Stone, 384 F.Supp. 633, 635 (N.D. Cal. 1974). The erroneous instruction must be so prejudicial as to affect the entire trial not merely an instruction which is "undersirable [sic], erroneous or even 'universally condemned'". *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cupp v. Naughten*, 414 U.S. 141, 146-147 (1973). The appraisal of the significance of error requires a comparison of the instructions actually given with those that should have been given. *Henderson*, 431 U.S. at 154; *Cupp*, 414 U.S. at 146-147.

It is a close question whether Part 3 of the jury instruction, allowing the jury to connect evidence of the baby's prior injuries to petitioner and then to the offense charged, was in violation of the California Evidence Code.[2/] However, we need not reach this issue because petitioner has not demonstrated that any possible error rendered his trial so fundamentally unfair that he was denied due process. *Ahlswede*, 720 F.2d at 1111. Admission of evidence of past acts, for the possibly improper purpose of connecting petitioner to those past acts and then to the offense charged, did not "infect the entire trial". *See Henderson*, 431 U.S. at 154.

2. California Evidence Code Section 1101(c) makes evidence of other crimes inadmissible when offered solely to prove criminal disposition or propensity on the part of the accused to commit the crime charged. *People v. Nottingham*, 172 Cal.App.3d 484, 495 (1985). On the other hand, Evidence Code Section 1101(b) makes admissible evidence of prior acts relevant to prove some fact expressly in issue, such as the motive, intent, knowledge or identity of the perpetrator of the crime charged. Whether evidence is relevant under Section 1101(b) depends additionally on whether its probative value outweighs any undue prejudice. *People v. Tassell*, 36 Cal.3d 77, 88 (1984).

Examination of the trial record reveals that there was substantial evidence, however circumstantial, to support the jury's finding that the baby's death was the result of a murder and that petitioner was responsible. Admission of prior act evidence did not amount to a "crucial, critical, highly significant factor" in the jury's finding of second degree murder. *See Love v. Young*, 781 F.2d 1307, 1312-1313 (7th Cir. 1986). The jury heard evidence that petitioner was in the house at the time of the baby's death and that his wife, the only other person in the house that day, stepped outside before the baby had been fatally injured. The jury heard petitioner's wife testify. This and other evidence allowed the jury to decide petitioner was behind the baby's death notwithstanding any prior act evidence.

3. *Miranda* Violation

Petitioner spoke with police and investigators several times on July 7, the day that he and his wife brought their injured baby to the hospital. No *Miranda* warnings were given to petitioner before or during any of these July 7 discussions. On July 8, petitioner was asked to come to the police station and when he arrived was given *Miranda* warnings before questioning took place. At trial, the prosecution introduced one of petitioner's statements, made on July 8, after *Miranda* warnings. Petitioner now urges that this statement was involuntary and in violation of his Fifth Amendment rights, because even though it was made after proper administering of *Miranda* warnings, it was the fruit of prior illegal interrogations by investigators.

Miranda warnings are required whenever a person questioned is in custody or the restraint on his freedom of movement is of a degree associated with formal arrest. *California v. Beheler*, 463 U.S. 1121, 1123 (1983); *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977). Mere presence at the police station cannot be necessarily equated with custody. *See Beheler*, 463 U.S. at 1123. Although this Court must independently make the legal conclusions as to whether a petitioner was in custody at the time of a statement, and as to whether statements were voluntary, this Court must presume the correctness of all state court factual findings, unless there is no factual support for them in the record. *Summer v. Mata*, 449 U.S. 539, 545 (1981).

The state court examined the discussions between petitioner and investigators voluntarily and while petitioner was not in custody.[3] We find ample support in the record for this position. No restrictions were placed on petitioner's freedom of movement during any of the July 7 discussions, including those taking place at the police station. Upon accompanying the police officers to the station on July 7, petitioner was specifically told that he was not under arrest and was under no obligation to go there. Because all of the July 7 questioning took place while pettioner [sic] was not in custody, no *Miranda* warnings were required and the July 8 statement used at trial was not the fruit of prior illegal interrogation.

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3. The trial court did not consider the statement made at the apartment complex to one of the officers that "Maybe some Mexicans came through the door." However, this statement was also made voluntarily and while petitioner was not in custody, and does not alter our conclusion that all July 7 questioning was noncustodial.

Petitioner further argues that police used trickery and deception during the July 7 discussions by withholding from him information that his baby had died and that he was a suspect in the death. Petitioner contends that this deception rendered the July 7 questioning coercive and tainted the subsequent statement given after *Miranda* warnings. This Court finds no support in case law for the view that trickery or deception render questioning coercive. Petitioner was told he could refuse to speak and could request a lawyer and was aware that any statement he made could be used against him. Waiver of his rights on July 8 was thus free and voluntary and the statement coming out of the July 8 questioning was properly introduced against him. *See Moran v. Burbine*, 106 S.Ct. 1135, 1142 (1986).

4. Prosecutorial Misconduct

Petitioner argues that the prosecutor made several prejudicial remarks during closing argument which constituted misconduct and denied him due process of law. Only one of the allegedly prejudicial statements was objected to at trial by petitioner's counsel. That objection came at the beginning of the prosecutor's argument, during which the prosecutor discussed first degree murder in this second degree murder case. Petitioner's counsel, in his state appellate court brief submitted to this Court, claims that because this objection was overruled, he did not want to continue to make objections during the closing argument which would almost certainly be overruled. The remarks complained of which were not objected to include: 1) statements implying that

petitioner's wife offered testimony which was part of a defense plot to suborn perjury; 2) statements made that the crime would go unpunished if the jury believed petitioner had not commited [sic] the crime because his wife had been granted immunity; 3) an inflammatory statement that if the jury believed petitioner, it should send him home to pick up his other recently born baby; 4) references made to inflammatory and controversial cases in an attempt to link the apparent miscarriage of justice found in those cases to a not guilty verdict for petitioner.

Under California law, claims of misconduct can only be reversed on appeal if objected to at trial. *People v. Fosselman*, 33 Cal.3d 572, 580-581 (1983). Under *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977), the failure to observe a state's "contemporaneous objection" rules results in a procedural default which precludes habeas corpus relief. The only exception to this default rule occurs when a petitioner can demonstrate that there was "cause" for his failure to raise the objection at trial, and "prejudice" accruing from the failure to object. *Engel v. Isaac*, 456 U.S. at 129; *see also Hines v. Enemoto*, 658 F.2d 667, 673 (9th Cir. 1981). Even where instances of prosecutorial misconduct are properly objected to at the state trial, a federal court is limited to determining solely whether the defendant was denied due process. *Donnelly v. DeChristofoto*, 416 U.S. 637, 642 (1974). The touchstone of due process is the fairness of the trial, not the misconduct of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219-220 (1982).

Petitioner has effectively defaulted on those alleged instances of prosecutorial misconduct which were

not objected to at trial. Failure of counsel to object to a prosecutor's statements for the strategic reasons does not satisfy the "cause" prong of the *Sykes* standard, and petitioner's argument, that his counsel failed to object at trial because he did not want to be continuously overruled, amounts to a failure to object for strategic reasons. *See Hines*, 658 F.2d at 673. In addition, although petitioner has preserved his claim that the prosecutor's references to first degree murder in his closing argument constituted misconduct, petitioner has made no showing of a constitutional violation. Petitioner has not demonstrated that his trial was rendered so fundamentally unfair by the prosecutor's remarks that due process was denied. *See U.S. v. Foster*, 711 F.2d 871, 883 (1983); *Thomas v. Cardwell*, 626 F.2d 1375, 1381 (9th Cir. 1980).

5. Denial Of Discovery

In his petition, petitioner argues that the prosecution's violation of a discovery order denied him his constitutional rights to a fair trial.[4/] The discovery order in question called for the prosecution to release all statements made by petitioner to police officers during any of the questioning preceding trial. Petitioner made a statement at his apartment in response to Officer Lapic's

4. This claim is properly before the Court at this time even though the claim was not included in this Court's earlier Order to Show Cause. Petitioner's counsel has fully briefed the issue for this Court, and the Court finds that it is able to make a determination of this claim after careful review of petitioner's arguments and of the record before the Court.

questioning regarding the origin of the baby's bruises, that "Maybe some Mexicans came through the door." This statement was not revealed to the defense before Officer Lapic testified at trial. Petitioner contends that the prosecutor's failure to comply with the discovery order and reveal the statement before trial violated his due process rights for two reasons. First, petitioner claims that the revelation of Officer Lapic's questioning regarding the origin of the bruises could have been persuasive to the trial court at the Motion to Suppress that the interrogation violated *Miranda*. According to petitioner, Officer Lapic's questioning indicated that the officer knew the criminal degree of force used upon the body. Second, petitioner maintains that his lack of awareness of the statement regarding Mexicans left his counsel "ill-prepared" to select the jury.

The Court finds that petitioner's claims lack merit. Even considering Officer Lapic's questioning of petitioner, this Court finds that the interrogation of petitioner did not violate his *Miranda* rights. In addition, this Court finds that counsel's lack of awareness of petitioner's statement did not violate petitioner's due process right to an adequate opportunity to voir dire the jury. Therefore, petitioner is not entitled to relief on his claim for violation of the discovery order.

Accordingly, good cause appearing, IT IS HEREBY ORDERED that petitioner's application for a writ of habeas corpus is denied.

IT IS FURTHER ORDERED that petitioner's motion for reconsideration of application for bail pending determination of petition for writ of habeas corpus is denied.

IT IS SO ORDERED.

DATED: July 15, 1987

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

APPENDIX D

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK OWEN McGUIRE,	)	
Plaintiff-Appellant,	)	No. 87-2522
	)	
v.	)	D.C. No.
	)	CV-85-6521-TEH
WAYNE ESTELLE,	)	
Warden,	)	ORDER AND
Defendant-Appellee.	)	DISSENT
	)	

Filed November 23, 1990

Before: Mary M. Schroeder and Charles Wiggins, Circuit Judges, and Albert Lee Stephens, Jr.*/, District Judge.

ORDER

The panel has voted to deny the petition for rehearing and reject the suggestion for rehearing en banc. Judges Kozinski and Trott would grant the suggestion for rehearing en banc.

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*. Hon. Albert Lee Stephens, Jr., United States District Judge for the Central District of California, sitting by designation.

The full court has been advised of the suggestion for an en banc. An active judge requested a vote on whether to rehear the matter en banc. The request failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed.R.App.P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

DISSENT

KOZINSKI, Circuit Judge, with whom Circuit Judge TROTT joins, dissenting from the order rejecting the suggestion for rehearing en banc.

Six month old Tori McGuire died in a hospital emergency room, the victim of appalling internal injuries: her liver was split in half, her pancreas was lacerated and split apart, her lower right lung and the large vein from her heart were damaged, and part of her large intestine was lacerated. No, little Tori was not the victim of a hideous automobile accident; nor had she been extracted from the rubble of an earthquake. She had been beaten to death. Her lifeless body, with dozens of contusions on her chest and abdomen, was brought to the hospital by her parents who claimed they didn't know what could have happened to her. Perhaps, the father said, "the baby fell off the couch" or maybe "some Mexicans" broke in and abused her while he was out of the room. Not taken in by these transparent falsehoods, the state brought charges against the father, Mark McGuire. A state jury convicted him of second degree murder; the conviction was affirmed on appeal.

A panel of this court now overturns the conviction, quite possibly forever. In so doing, it not only reaches a result that is contrary to simple justice and common sense, but does so in a way that will seriously interfere with the authority and autonomy of the state courts in many other criminal proceedings. Most fundamentally, the panel overturns the state conviction because it disagrees with the state court on questions of *state* law.[1/] Worse, the panel punishes the prosecution for introducing what the court deems to be unnecessary evidence of the defendant's intent, even though intent is clearly an element of the crime with which McGuire was charged. Finally, the panel misapplies the teachings of *Chapman v. California*, 386 U.S. 18 (1967), and *United States v. Hasting*, 461 U.S. 499 (1983), by failing to consider "the entire record prior to reversing a conviction for constitutional errors that may be harmless." *Id.* at 509 n. 7.

This opinion is markedly out of step with the law of the Supreme Court and this circuit governing these sensitive and important issues. While en banc procedures are cumbersome and time consuming, such considerations ought not deter us from maintaining uniformity in the law of the circuit, as well as correcting an obvious miscarriage

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1. A similar concern was raised by *Blair v. McCarthy*, 881 F.2d 602 (9th Cir. 1989, *cert. granted*, 59 USLW 3210 (Oct 2. 1990)(No. 89-1862), vacated as moot and remanded ___ USLW ___ (1990), where the first question presented was: "Has court below improperly and unduly expanded scope of federal habeas corpus relief by granting such relief in absence of any federal violation on sole basis of alleged violation of state procedural rule plus finding that it is 'reasonably probable' that different result would have occurred in absence of state law error?"

of justice. Because my colleagues' decision not to take this case en banc lets stand what I consider to be a wholly unacceptable precedent, I must respectfully dissent.

Discussion

Tori McGuire's short life was the type of horror no sentient being should have to endure. In addition to the ghastly injuries that caused her death, the doctors who examined her discovered some earlier injuries -- rectal tearing that was at least six weeks old and several partially healed rib fractures that were approximately seven weeks old. The prosecution introduced evidence of these earlier injuries, and the trial court instructed the jury as to the inferences it could draw therefrom. This evidence and these instructions lie at the heart of the panel's decision to overturn the conviction. A dispassionate review of the state court proceedings, however, reveals that no error at all was committed, much less an error of constitutional dimensions, and that the disputed evidence was, in any event, not prejudicial given the overwhelming evidence of McGuire's guilt.

A. The Panel Second-Guessed The State Courts On Questions Of State Law

This is not an appeal from a federal criminal conviction; it is a state habeas corpus case. Our function is limited to determining whether the petitioner's constitutional rights were violated. *Engle v. Isaac*, 456 U.S. 107, 119 (1982); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir.), *cert. denied*, 110 S.Ct. 344 (1989);

Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). In making that determination, we do not review issues of state law, such as evidentiary rulings; we are bound by the state courts' interpretations of the law entrusted to them. The panel disregards this limitation entirely and overturns Mark McGuire's conviction because it disagrees with the way the state court resolved questions of state law concerning the admissibility of evidence and the wording of jury instructions.

On the evidentiary question, the state trial court admitted proof of prior injuries for three separate reasons, one of them being that it tended to establish that Tori was a battered child, pursuant to a theory known as the "Battered Child Syndrome." The state court of appeal affirmed:

> [P]roof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

People v. McGuire, No. A017800, at 7 (Cal.App. Jan. 15, 1985), citing and discussing *People v. Bledsoe*, 36 Cal.3d 236 (1984); *People v. Jackson*, 18 Cal.App.3d 504 (1971); and *Landeros v. Flood*, 17 Cal.3d 399 (1976). Our panel flatly disagrees with this determination:

> The trial court incorrectly admitted the evidence *pursuant to California law* allowing past injury evidence to establish the "Battered Child Syndrome." The Battered Child Syndrome allows proof of past injuries to prove the child's present injuries did not occur accidentally. *See People v. Jackson*, 18 Cal.App.3d 504, 506,

95 Cal.Rptr. 919, 921 (1971); *Landeros v. Flood*, 17 Cal.3d 399, 409, 551 P.2d 389, 393, 131 Cal.Rptr. 69, 73 (1976).

901 F.2d at 754 (emphasis added).

What can one possibly say about this? The panel not only expressly states that the state court erroneously admitted the evidence "pursuant to California law," but it relies on two of the same cases that the state court of appeal relied on in reaching the opposite conclusion. Until reading the panel's opinion, I had thought the federal courts were bound by state court interpretations of the state rules of evidence. Apparently, however, the panel has now declared open season on state court evidentiary rulings in the Ninth Circuit.

The panel makes precisely the same mistake when it concludes that "[s]ubsection 3 of the [prior bad acts] instruction is erroneous." 902 F.2d at 755. The panel's only explanation for this conclusion appears in a footnote:

> It appears that the trial court's erroneous instruction was the result of an incorrect reading of CALJIC 2.50 (1979 Revision). This standard jury instruction has been clarified to avoid the misunderstanding which occurred here. *See* CALJIC 2.50 (1987 Revision).

Id. at 755 n. 2. Once again, the panel cites only state law in support of its conclusion that the state courts committed error.

The panel does ultimately conclude that "the faulty instruction considered along with the admittance of the prejudicial evidence 'so infected the entire trial that the resulting conviction violate[d] due process.'" 902 F.2d

at 755 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)). This reference to the due process clause does not repair the damage done by the panel's earlier analysis. The problem is that, in order to conclude that there was a due process violation, one must first determine that the state trial court erred. The panel made that initial determination by relying almost exclusively on state law, which it reads in a way directly contrary to the state court's reading.[2/]

B. *Evidence Of Intent Was Proper And Necessary*

In concluding that the evidence of prior injuries was improperly admitted, the panel suggests that the evidence was not relevant. *Id.* at 754. As discussed above, the panel had no business second-guessing the state courts on a question of state law. Having started down this path, however, the panel makes a collateral error, one with grave constitutional implications.

As the panel recognized, evidence is admitted pursuant to the Battered Child Syndrome theory to prove that the death was not accidental. *Id.* If the child has

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2. I say *almost* exclusively because the court does sprinkle in citations to federal law, particularly the Federal Rules of Evidence. *See, for example*, 902 F.2d at 754 (citing FRE 404(b) and *United States v. Lewis*, 837 F.2d 415 (9th Cir.) *cert. denied*, 488 U.S. 923 (1988)); *Id.* at 755 (citing FRE 404(a) Advisory Committee note and *United States v. Green*, 648 F.2d 587, 594 (9th Cir. 1981)). The Federal Rules of Evidence, the Advisory Committee notes, and federal criminal cases are, of course, wholly irrelevant to a state habeas case, where the only issue is whether the trial violated constitutional norms. The panel's opinion in this case could well be construed as giving the Federal Rules of Evidence a constitutional cast. *See id.* at 755.

suffered a series of injuries as the result of child abuse, this tends to make it less likely that the injury in question resulted from a mishap. *People* v. *Jackson*, 18 Cal.3d 504, 507, 95 Cal.Rptr. 919, 921 (1971). The panel concludes that the evidence of prior injuries was irrelevant because "in the instant case, no claim was made that the child died accidentally." *Id.* According to the panel, the only issue at trial was *who* killed Tori, not whether the killing was intentional.

This passage in the panel's opinion has serious implications: It suggests that due process may be violated by the admission of evidence which clearly goes to an element of the offense charged if it turns out that the defense does not put that particular element in issue. This reasoning, if it stands as the law of the circuit, will present state prosecutors with an intractable problem: Just how are they to know whether the defendant intends to put a particular element of the crime in issue? After all, the prosecution must go first and bears the burden of establishing every element of the crime beyond a reasonable doubt -- including, for second degree murder, malice aforethought, Cal. Penal Code §§ 187, 189 (West 1988). If the prosecution decides not to present proof of any element of the crime on the theory that the defense will not put that element in issue, the defendant automatically becomes entitled to a directed verdict of acquittal. James W. Moore and Jo D. Lucas, 5A *Moore's Federal Practice* ¶ 50.02[1] at 50-16.1 to 50-17 (2d ed. 1990). The simple reality is that, in a criminal case, *every* element of the crime is in issue; the defense is free to sit back and see how the prosecution's case shapes up, and then focus its attack where the prosecution is weakest.

The panel's insistence that intent was not an issue in the case is contradicted not only by elementary principles of criminal procedure, but by the record in this case as well. As the panel recognizes, McGuire at one time claime[illegible]he baby was injured when she fell off the couch. [illegible].2d at 751. He later suggested that "maybe some Mexicans came in while I was upstairs." *Id.* How on earth was the prosecutor to know that McGuire would not raise one of these defenses when his turn came to put on evidence?"[3] More fundamentally, if the prosecutor decided to play it safe by introducing evidence in addition to the fatal injuries to prove that the death was not accidental, how can we say that the evidence was irrelevant? For the panel to look at the evidence after the case was closed and say that the prosecutor was too cautious in proving every element of the offense is nothing but 20/20 hindsight.[4]

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3. Indeed, early in the trial the prosecutor advised the court that he anticipated the defense would rely primarily on the "some Mexicans" theory, with "try[ing] to hang it on momma" a less likely alternative. Reporter's Transcript on Appeal, *People of the State of California v. McGuire*, H 3748 (RT) 213-24 (Book II).

4. As it turns out, the defense *did* raise the issue of intent, and very vigorously. Defense counsel objected to a jury instruction on second degree murder, stating "I don't think there is evidence of intent." RT 562 (Book V). She requested an involuntary manslaughter instruction, stating "my contention is that whoever killed the baby or hit the baby had no malice, had no intent to kill the baby." RT 619. With the agreement of both sides, the court instructed the jury that "[t]he unintentional killing of a human being is excusable and not unlawful when committed by accident," and that "[t]he burden is on the Prosecution to prove beyond a reasonable doubt that the homicide was not excusable." RT 762. During her closing argument, defense counsel argued that the prosecution had failed to establish intent: "Involuntary manslaughter . . . is an

What are state prosecutors in the Ninth Circuit supposed to do when presented with a situation such as that here? On the one hand, they face the possibility of a directed verdict or unfavorable jury instruction if they fail to prove an element of the case that somehow seems "obvious." On the other hand, under today's precedent, they face the possibility that a federal court -- with the benefit of hindsight -- will conclude that the evidence was not really necessary because that particular element of the crime was not contested by the defense. It is obvious that the McGuire prosecutor could not have guarded against this type of whipsaw; more troubling is that, even with today's precedent in hand, no prosecutor will know when to withhold evidence or when to include it until he sees the defendant's evidence, by which time it will be too late. In common parlance, this is known as a Catch-22.

C. *Panel's Harmless Error Analysis Is Deficient*

It is well established that errors, even constitutional ones, do not warrant overturning a state conviction unless it is determined that the errors are not

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unlawful killing of a human being where there is no intent to kill and no malice. That is what we have here, if anything." RT 720. See also RT 718-19. In McGuire's motion for a new trial after the verdict came in, defense counsel asserted that the trial court had erroneously failed to instruct the jury on the requirement of specific intent. Clerk's Transcript on Appeal, *The People of the State of California v. McGuire*, H 3748 (CT) 155. Thus, while the panel appears to have labored under the misapprehension that McGuire had conceded or stipulated to intent, defense counsel was well aware of the state's burden of proof as to McGuire's state of mind, and pressed the issue forcefully.

harmless. *Chapman v. California*, 386 U.S. 18-33 (1967). Except where the error is so fundamental that it is deemed harmful per se, which is not the case here, the federal court must examine the *entire* state court record to determine whether the jury would have reached a different conclusion absent the error. *United States v. Hasting*, 461 U.S. 499, 509 n. 7 (1983).

The panel here speaks the language of harmless error analysis but fails to perform the tasks associated therewith. The sum and substance of the panel's harmless error "analysis" is the following: "Although there was evidence suggesting McGuire's guilt, this evidence was certainly not overwhelming." 902 F.2d at 755. The panel does not state that it has reviewed, or even seen the state court record; it does not discuss the evidence supporting guilt; and it does not analyze how the trial would have played out had the perceived errors been eliminated. Harmless error analysis that is so utterly devoid of analysis is no better than no harmless error analysis at all. At a bare minimum, it seems to me, the panel must represent that it has ordered the state court record, looked at it, and undertaken the type of review mandated by the Supreme Court.

Quite frankly, it is impossible to review the record in this case and understand how the panel reached its conclusion. Take, for example, the error perceived by the panel as to the admission of the evidence under the Battered Child Syndrome. Even if the panel were correct in concluding that the evidence was improperly admitted for this purpose, *it does not matter*. The trial court found the evidence of prior injuries admissible for three distinct purposes: (1) to establish the existence of Battered Child

Syndrome; (2) to show that McGuire had committed similar prior bad acts;[5] and (3) to impeach Mrs. McGuire's testimony that Mr. McGuire was kind to his daughter. RT 573-75 (Book V), 757. The state court of appeal found the evidence admissible on the first of these grounds, and so did not reach the other two. *People v. McGuire*, No. A017800, at 5-7 (Cal.App. Jan. 15, 1985).

Where a trial court admits evidence for three independent reasons, and we find one of them insufficient, our job is hardly done.[6] All evidence is admissible for some purposes but inadmissible for others; we could reverse convictions any time we liked were we to focus on one purpose exclusively. Here, the panel did not find the evidence was inadmissible on the other two grounds; therefore, it is bound to assume that the evidence would have been admitted in any event. In light of the indisputable record on this point, I fail to see how McGuire suffered *any* prejudice from the alleged error

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5. The trial court treated Battered Child Syndrome and prior bad acts as separate evidentiary categories; it may be more accurate to say that evidence of Battered Child Syndrome is a subset of evidence of prior bad acts. For our purposes it makes no difference: A finding that evidence is inadmissible to prove Battered Child Syndrome says nothing about whether the evidence may be admitted for the broader purpose of showing prior bad acts.

6. That the state court of appeal only considered one ground for admission is not, of course, dispositive. Having found the evidence admissible on one ground, the court of appeal had no need to examine whether the evidence was admissible on other grounds as well. To find the evidence inadmissible -- and so highly prejudicial as to constitute a due process violation -- we must make sure that it is not in fact admissible on *any* of the grounds relied on by the trial court.

regarding admission of evidence of the Battered Child Syndrome, much less a denial of due process.

But there is more. Even were we to assume, with the panel, that admission of the evidence was prejudicial error, the panel was required to decide whether the jury would have convicted anyway. See *United States v. Hasting*, 461 U.S. at 510-11. A determination on this issue required the panel to weigh the prosecution's case, the likely effect of the wrongfully admitted evidence and the likelihood that the jury would have come to a different result. A review of the record leads only to one conclusion: The jury would have reached exactly the same verdict regardless of the errors perceived by the panel.

First, the record discloses that the prosecution's case was very strong indeed. In weighing the strength of that evidence, it must be kept in mind that there were only two plausible theories of the case: that the father abused Tori or that the mother did; no one else had access to the baby immediately prior to her death. While the 1500 page trial transcript contains a good deal of testimony establishing that the father did it, perhaps the strongest piece of evidence is the testimony of several witnesses who overheard a conversation between Mr. and Mrs. McGuire at the hospital while the couple was waiting to learn Tori's fate:

> While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he

> "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

People v. McGuire, No. A017800, at 3 (Cal.App. Jan. 15, 1985).

This conversation makes no sense at all unless it was the father who abused the baby. Had the baby been alone with the mother at the time she suffered the injuries, as Mrs. McGuire claimed at trial, one would have expected the accusations at the hospital to point entirely the other way. Not only did McGuire fail to question or accuse his wife, he lamely suggested the baby "fell off the couch" and did not protest her accusation that "you are responsible." Short of a videotape of the crime, it's not clear what better evidence the prosecution might have presented.

The fact is, child abuse cases are inherently difficult to prove: the evidence is usually circumstantial and often ambiguous; eyewitnesses seldom come forward because of family considerations; and the victims often are dead or too young to speak. See, for example, *United States v. Boise*, No. 89-30071, slip op at 12157 (9th Cir. September 27, 1990). It is rare indeed to have a case like this one, where the defendant makes what is tantamount to a spontaneous confession of his guilt. When this conversation is viewed in the context of all the other evidence presented to the jury, see *People v. McGuire* at 2-4, one must conclude that the prosecution's case was extremely strong.

Second, the prejudice flowing from any error would have been minimal. If I understand the panel's

rationale correctly, it is that the prosecution failed to sufficiently prove McGuire's connection to the earlier acts of child abuse. Even if that were true -- which it clearly is not[7] -- how was the defendant prejudiced? Evidence of the earlier abuse could *only* harm the defendant to the extent the jury was convinced he committed those acts. If the jury was in doubt, or believed that someone else (for example, Mrs. McGuire) committed the bad acts, its outrage over them would not have been directed at Mark McGuire.

Finally, it is highly unlikely that, absent the error, the jury would have reached a not guilty verdict because to do so it would have had to adopt the defense's alternative theory -- that the mother did it.

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7. The record contains ample evidence from which a rational jury could conclude that McGuire had been the perpetrator of the earlier injuries:

> -- Mrs. McGuire's statements to Detective Gillis to the effect that, when she bathed Tori, she noticed the child had bruises on her body. When asked how Tori might have gotten those bruises, Daisy responded:
> **McGuire:** I don't really know, you know, I am not the only one who is taking care of her.
> **Gillis:** Well, who else is taking care of her?
> **McGuire:** My husband, too, takes care of her.
> -- Testimony by a neighbor "that she had observed McGuire pick up the infant by 'one of her arms.' She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other 'bad things.' Mrs. McGuire, the witness said, was a 'very caring mother' toward Tori, who was never seen to 'abuse the child' in any way."

People v. McGuire, No. A017800, at 4 (Cal.App. Jan. 15, 1985).

> -- The fact that one of the injuries -- rectal tearing -- is sexual in nature, and of a type more likely made by a man than a woman.

Mrs. McGuire's "confession," made only after she was granted immunity and had the luxury of attempting to save her husband at no risk to herself, is halting and tentative, marked by evasion and lapses of memory. RT 333-39, 341-42, 351-58, 364, 385. It is also internally inconsistent, RT 353-56; contradicted by her earlier statements to the police and at the preliminary hearing, RT 370-75, 410-11, and by Mr. McGuire's own statements to the police, RT 209-10 (Book II), 251 (Book III); and inconsistent with the weight of the medical evidence.[8] The jury deliberated for three days and had extended passages of the trial transcript read back to it, including large portions of Mrs. McGuire's testimony. RT 254A (Book I), 777. This jury was clearly not inflamed by passion. McGuire got no worse than he deserved.

It is this type of inquiry, or something akin to it, that the panel was required to pursue under *Chapman*. Its unsubstantiated assertion that the evidence against McGuire "was certainly not overwhelming" simply does not do the job.

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8. Mrs. McGuire claimed to have killed the baby some time in the afternoon, "[a] long time" before her husband returned home. RT 353; *see also* RT 348; *but see* RT 356 ("I beat my child when he, shortly before he comes home on that evening."). The infant most likely died within minutes of having been beaten. RT 139-140 (Book II). Yet when the McGuires took the baby to the hospital at nine in the evening, RT 87 (Book II), the doctors believed they had a chance of resuscitating the child because irreversible brain swelling had not yet begun, indicating that her death was very recent. RT 86, 98-99, 169-71 (Book II).

D. *Reprosecution Of McGuire May Be Precluded*

When a federal court grants a writ of habeas corpus, the state normally has the option of retrying the defendant. This is not the case, however, when there is a determination that the prosecution failed to meet its burden of proof on any element of the offense; under those circumstances, retrial is barred by the double jeopardy clause. *Burks v. United States*, 437 U.S. 1 (1978).

While the point is not entirely free from doubt, the opinion contains statements that could well preclude retrial of McGuire. Specifically, the panel casts aspersions on the prosecution's case by stating that "only the barest threads connect McGuire to the crime." 902 F.2d at 755. Worse still, the panel characterizes the state's evidence as suggesting no more than "mere shadows of guilt which *leave ample room for reasonable doubt*." *Id.* at 756 (emphasis added).

It is entirely possible that the state courts on remand will read these passages as holding that the prosecution failed to introduce sufficient evidence to meet its constitutional burden of establishing guilt beyond a reasonable doubt. Certainly it would be difficult to come up with language more clearly conveying this idea than that used by the panel. If the state court *does* construe the panel's opinion as precluding a retrial, there will be no possibility of correcting the error. Once McGuire is released, the prosecution has no mechanism for coming into federal court to complain, as the state is not entitled to collaterally attack the state judgment.

Conclusion

The panel has overturned a state conviction, and has done so in a manner that seriously and unjustifiably interferes with the authority of the state courts, hamstrings state prosecutors and may result in the permanent release of a defendant who was justly and properly convicted of a heinous crime. We make a grave mistake by failing to take the case en banc to correct these errors and set the law of the circuit back on course.

APPENDIX E

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	FILED: 12/10/87
Plaintiff and Respondent,	)	A017800
v.	)	(Alameda County Super. Ct.
MARK O. McGUIRE,	)	No. H 3748)
Defendant and Appellant.	)	

Defendant Mark O. McGuire was convicted by a jury's verdict of the second degree murder of his six-month old infant daughter, Tori. He appeals from the judgment which was entered upon the jury's verdict.

We affirm the judgment for the reasons we now state.

Evidence adduced at the trial, presumably found true by the jury, revealed the following.

Defendant McGuire, and his wife, Daisy, brought their infant child Tori into the emergency room of an Alameda County hospital one evening. The child was bluish in color, not breathing, and bruises appeared upon

her body. Her father, McGuire, explained that Tori suffered recently from a cold, and had that evening injured herself when she fell from a couch. Prompt medical measures of doctors and nurses were unavailing, and Tori died within the hour.

McGuire was thereafter charged with the murder of the child.

Expert medical witnesses at the trial testified to the following. When Tori was brought to the hospital, she indicated little or no signs of life, her body was cool, and she showed no heartbeat or pulse. She had a "relatively recent" bruise on her chest, with older multiple bruises around it. And there were blue marks on the infant's ears, and scar tissue indicating a tearing wound of her rectum.

An autopsy on Tori disclosed at least 17 separate contusions on her chest and around 30 in her abdominal area. There were "quite fresh," and suggested "perhaps the knuckles or fists striking the skin." An examination of her internal organs revealed that her liver had been split in two, her pancreas was lacerated and almost torn in half, her right lung and a large vein near the heart were damaged, and her lower intestine was lacerated. And she had several partially healed rib fractures. Such injuries appeared to have been caused by the same force or blows which caused the outer injuries. The injuries could not have been caused by a fall from a couch; and nothing but the application of "blunt force to this child" could have caused them. A medical witness said: "I don't think you can separate injuries, one from another, those types of injuries. A tremendous number of contusions all over the

front of the body, the neck area, and the injuries to the abdomen are totally inconsistent with falling even 16 feet."

The child's rectal injury was at least six weeks old, and was unlikely to have been caused by passage of hard stools; more likely it was caused by "the forceful insertion of a finger, or foreign object, or both."

The consensus of the People's professional medical witnesses was that Tori was a "battered child."

Tori had been in the custody of McGuire and her mother during the entire six months of her life.

While Tori was being treated, and McGuire and his wife were seated together in a hospital waiting room, Mrs. McGuire several times insistently asked "what really happened?" McGuire replied that he "didn't know," and that he "guessed" the baby fell off the couch; his response was always the same. Finally Mrs. McGuire said, "You are responsible," to which he apparently made no reply.

To police officers McGuire explained that "the baby must have fallen and struck the walker." And when an officer expressed doubt that her condition was consistent with a fall, McGuire said "maybe some Mexicans came in."

McGuire denied striking or abusing the child.

Mrs. McGuire testified at the trial. For the first time, there she said that she had been mad at Tori because of her crying, and had hit her on the day of the baby's death.

A neighbor of the McGuires, in the same apartment building, testified at the trial to matters occurring before Tori's death. She had "heard some ruckus and normally at that time there is just doors closing and cars starting up to go to work, but this time I

heard noises, voices saying please don't, please don't, I got up and looked out my bedroom window and I saw Mark [McGuire] having Daisy [McGuire] up against the wall with his legs to her stomach, choking her and she is trying to pull away." On another occasion Daisy appeared "rather upset and she had looked as if she was crying because I saw the tears from her eyes. [She said that Mark had] hit her across the face."

The neighbor testified also that she had observed McGuire pick up the infant by "one of her arms." She had also seen him, when the baby was crying, roughly pinch her cheeks together, and do other "bad things." Mrs. McGuire, the witness said, was a "very caring mother" toward Tori, who was never seen to "abuse the child" in any way.

And evidence indicated that McGuire and his wife were the only persons with Tori on the day of her death.

We state McGuire's several appellate contentions as phrased by him.

I. Contention: "The trial court erred in admitting evidence of prior injuries which were in no way tied to appellant."

It was the People's theory that Tori's death was brought about by McGuire's "child battering," which culminated in the events of the day of her death. And proof of the "battered child syndrome," has expressly been held admissible in this state.

A leading case on the subject, *Landeros* v. *Flood*, 17 Cal.3d 399, 408, has stated: "It appears from the literature that the battered child syndrome was first tentatively identified and reported to the medical

profession in the early 1950s. Further surveys and analyses of the syndrome followed. . . . California courts have not been oblivious to this development. In a prosecution for child abuse reviewed in 1971 -- the same year as the events here in issue -- the Court of Appeal held admissible the testimony of a physician identifying the typical elements of the battered child syndrome. (*People* v. *Jackson* .(1971) 18 Cal.App.3d 504, 506 [95 Cal.Rptr. 919].) The court explained that a physician's diagnosis of battered child syndrome essentially means that the victim's injuries were not inflicted by accidental means, and 'This conclusion is based upon an extensive study of the subject by medical science.' (*Id.*, at p. 507.) Citing portions of the literature referred to hereinabove, the court concluded (*ibid.*) that 'the diagnosis of the "battered child syndrome" has become *an accepted medical diagnosis*.' (Italics added.) Indeed, the Court of Appeal added that 'Trial courts have long recognized the "battered child syndrome" and it has been accepted as a legally qualified diagnosis on the trial court level for some time. . . .' (*Id.*, at pp. 507-508; . . .)"

And more recently the high court in *People* v. *Bledsoe*, 36 Cal.3d 236, 249, has said: "In *People* v. *Jackson* [18 Cal.App.3d 504] -- the first such case in California -- the court explained that '[t]his syndrome means that a child has received repeated and/or serious injuries by non-accidental means. . . . [T]he criteria for the "battered child syndrome" . . . are (1) the child is usually under three years of age; (2) there is evidence of bone injury at different times; (3) there are subdural hematomas with or without skull fractures; (4) there is a seriously injured child who does not have a history given

that fits the injuries; (5) there is evidence of soft tissue injury; (6) there is evidence of neglect . . . [¶] A finding . . . of the "battered child syndrome" . . . simply indicates that a child found with the injuries outlined above has not suffered those injuries by accidental means.' (18 Cal.App.3d at pp. 506-507.) As this description suggests, the battered child syndrome cases fall well within the mainstream of a long line of California decisions which permit an expert medical witness to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself. . . ."

Under this authority, proof of Tori's "prior injuries" tending to establish the "battered child syndrome" was patently proper.

II. Contention: "Mistrial should have been granted when the highly inflammatory 'Mexican intruder' statement was elicited at trial."

McGuire argues that disclosure of the "inflammatory Mexican intruder statement" was not timely made to him under the trial court's discovery order.

As earlier noted, a uniformed police officer, not assigned to investigate the case, had commented to McGuire that the child's injuries seemed inconsistent with a fall from the couch. It was then that McGuire said, "maybe some Mexicans came in." The officer, believing the remark of no importance, made no note or report of it, and the prosecutor did not learn of the remark until a few minutes before it was offered in evidence at midtrial. The remark was relevant evidence, susceptible of an

inference that such an absurd explanation might indicate a consciousness of guilt.

The trial court, following a hearing, concluded that there had been no intentional violation of the discovery order, and that the evidence's tardy disclosure was excused. The following courtroom colloquy took place.

"The Court: Let me ask you this. Since he didn't have this information before and didn't have an opportunity to give you this discovery before, if you have got a surprise element, then what do we need to enable you to deal with this situation? . . . If you need some time to do some investigation or check anything else out brought out of the surprise element, I am willing to give you that. But as far as if you want to wait until your cross-examination and have somebody check something out or do anything, I am willing to accommodate you that way.

"Ms. Simpson [defense attorney]: I would be asking for some kind of instruction.

"The Court: Before we do that, why don't you do your investigation or whatever it is, if you are asking for time, then let's deal with it and then when we come back then we can decide how to best handle it. It may be something that you are going to get anyway in the natural course of things. If you could have gotten it in the natural course of things, then it may not be that damaging. . . . I feel that if there is a need for you to have further time to investigate into the origin and scope of this comment that is alleged to be made by your client, then I am willing to accommodate you.

"Ms. Simpson: I would like to have that opportunity.

"The Court: Okay. Can you do that by tomorrow morning?

"Ms. Simpson: I think I probably can."

We perceive neither abuse of discretion,nor error, in the trial court's resolution of the problem.

III. Contention: "The trial court erred in admitting appellant's statement which was the fruit of an unconstitutional interrogation."

On the evening of Tori's death, police officers, investigating the case, had questioned both McGuire and his wife. At that point McGuire was *not* under arrest or in custody; he had been so informed and the police had no intention of arresting him. And the *Miranda* admonition was *not* given. The couple were then asked to come to the police station the following day, and the decision to appear was theirs. Both parties "readily agreed." But by the time of their police station visit the next day, suspicion had focused on McGuire. Before any questioning, he was given an appropriate *Miranda* admonition, and the parties reiterated their earlier statements.

McGuire's instant argument is that the *first* police inquiry was in violation of *Miranda*, and that his subsequent Mirandized statements, offered in evidence at the trial, were its unconstitutional "fruits." The superior court had disagreed.

"[T]he trial court's ruling on a *Miranda* issue may not be set aside by us unless it is 'palpably erroneous.'" (*In re Eric J.*, 25 Cal.3d 522, 527.)

In ruling that McGuire's questioned statement might be admitted in evidence, the trial court stated: "There is nothing in here to indicate any reluctance on the part of the McGuires to go there. Their child had just died and there was an inquiry as to what was the cause of death. Nobody knew anything at that particular point in time. They were just trying to gather information. It was not until Dr. Herrmann does an autopsy that they become aware of the fact that there were multiple bruises and this was the cause of death. At that point in time, he was Mirandized and he was given his rights and gave a statement."

The *Miranda* requirement applies only to "custodial interrogation." In *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495, the nation's high court stated:

"Our decision in *Miranda* set forth rules of police procedure applicable to 'custodial interrogation.' 'By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' 384 U.S. at 444. Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense. *Mathis* v. *United States*, 391 U.S. (1968), and to questioning taking place in a suspect's home, after he has been arrested and is no longer free to go where he pleases. . . ."

The trial court's comment was well supported by law, and by the record. Its ruling was *not* "palpably erroneous."

IV. Contention: "Prosecutorial misconduct was so prejudicial that appellant was denied a fair trial."

McGuire makes four assignments of such misconduct.

It is first argued that the prosecutor charged in his jury argument, that Mrs. McGuire's "confession" that she had "hit" Tori on the date of the child's death, was fabricated. Such a statement had some record support. It was accordingly not misconduct.

It is also argued that "the D.A. implied that court rulings were incorrect." We find nothing in the record reasonably supportive of the argument. And the prosecutor's reference to first degree murder was patently harmless, for, as noted, the jury's verdict was of second degree murder.

Moreover, we note that as to *three* of the four assignments, no trial court objection was made, and that as to *all* of them no alleviating jury admonition, which surely would have dispelled any conceivable prejudice, was sought. The misconduct charges are for those reasons not cognizable on appeal. (*People* v. *Green*, 27 Cal.3d a, 27-36.) And as said in *People* v. *Fosselman*, 33 Cal.3d 572, 581: "[G]enerally such [claims of misconduct] are deemed waived if the defendant does not object to them at trial. . . . He may raise the issue for the first time on appeal only if the trial court could not have cured the harm flowing from the misconduct by a prompt admonition to the jury. . . . In the present case the harm could have been cured by timely warnings, and hence defendant may not now be heard to complain."

The judgment is affirmed.

Elkington, Acting P.J.

WE CONCUR:

Newsom, J.

Holmdahl, J.